Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

JUDITH HILT-DYSON

Petitioner,

CITY OF CHICAGO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a Title VII claim of retaliation under 42 U.S.C. §2000e-3(a) requires the same ''adverse employment action'' needed to establish discrimination with respect to ''compensation, terms, conditions, or privileges of employment'' under 42 U.S.C. §2000e-2(a)(1)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 27, 2002.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-17) is reported at 282 F.3d 456. The opinion of the district court (App.19-36) is not officially reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals was entered on February 27, 2002. (App. 18.)

STATUTE INVOLVED

This case involves the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. §2000e-3(a) makes it unlawful

> For an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT

On March 26, 1999, petitioner Judith Hilt-Dyson complained to respondent City of Chicago about two instances of improper touching by her supervisor, a police lieutenant.[1] While respondent was investigating

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1. On March 24, 1999, petitioner was at work in the Evidence and Recovered Property Section of the Chicago Police Department when she was approached by her supervisor, who stood over her and rubbed the middle of her back with his left hand. (App. 2.) The next day,

petitioner's complaint, the supervisor singled petitioner out during a uniform inspection: the supervisor skipped over the first officer in the inspection line, and, while staring at petitioner's chest, ordered petitioner to raise her arms. (App. 3.) The supervisor later stated that he took this action to determine if petitioner's uniform blazer fit property; a male co-worker who observed the inspection described the supervisor's order as demeaning.[2]

March 25, 1999, petitioner was eating lunch with several of her co-workers in the mail room at the Evidence and Recovered Property Section when the same supervisor rubbed the middle of petitioner's back and touched her shoulder. (Id.)

2. The co-worker described the incident as follows:

> * * * [H]e told her to raise her arms. And Officer Dyson said "Lieutenant, let me get this right. Are you telling me to raise my arms?" And he said "Yes."
>
> And at which point, she did so. Now, Officer Dyson is a healthy woman. You know, she is endowed. And the Lieutenant standing right up on her when she did this.
>
> And at that point, she raised her arms, and you could see the tears start forming in her eyes behind it, as he stood — and she is a tall woman. So, Lieutenant Sutherland is not the tallest man. So, he is almost eye level with her chest. And that's you know — that's what happened.

On July 16, 1999, the Chicago Police Department's Office of Professional Standards, which had investigated petitioner's complaints, recommended that the lieutenant be suspended for two days. (App. 4.) This recommendation was rejected on December 15, 1999 by the lieutenant's supervisors.

On January 8, 2000, petitioner inadvertently touched the left elbow of another officer in the mail room at the Evidence and Recovered Property Section. (App. 5.) Based on the lieutenant's report that he had observed petitioner grab the other officer's arms and pull her over a ten foot distance, the Chicago Police Department's Office of Professional Standards recommended that petitioner be suspended for seven days. (App. 6.)

Petitioner was interrogated about the January 8th incident on February 10, 2000. The next day, petitioner saw her personal physician, who prescribed antidepressant and anti-anxiety medication, referred petitioner to a psychiatrist, and concluded that she was unable to work as a police officer. Respondent's psychologist confirmed that petitioner was suffering from "emotional distress, including headache, nervousness, crying, and sleep problems" and agreed that petitioner was psychologically unable to work as a police officer.

Petitioner returned to work after eight months of treatment for her psychological distress. Respondent did not impose any discipline on petitioner for the January 8th incident.

Petitioner argued in the district court that the two touching incidents constituted actionable sex discrimination under 42 U.S.C. §2000e-2(a) and that the uniform inspection incident and the false battery complaint

constituted retaliation contrary to 42 U.S.C. §2000e-3(a). The district court granted summary judgment to respondent on all claims. (App. 19-36.) The Seventh Circuit affirmed. (App. 1-17.)

The court of appeals concluded that the two touching incidents did not constitute actionable sexual harassment under Title VII because "an objective person would not view [petitioner's] work environment as hostile or abusive." (App. 10.) The court of appeals reached the same conclusion about the uniform inspection incident. (App. 11.)

Turning to petitioner's retaliation claims, the Seventh Circuit concluded that petitioner had failed to come forward with enough evidence to warrant a trial about the January 8th "touching incident." (App. 15-17.) The court of appeals concluded that the uniform inspection "did not constitute an adverse employment action" because the supervisor's "conduct during the inspection was not severe enough to constitute actionable sexual harassment." (App. 14.)

REASONS FOR GRANTING THE WRIT

There is a split among the circuits about whether a claim of retaliation under 42 U.S.C. §2000e-3(a) requires the same "adverse employment action" needed to establish discrimination with respect to "compensation, terms, conditions, or privileges of employment" under 42 U.S.C. §2000e-2(a)(1).

Section 2000e-2(a)(1) makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

individual's race, color, religion, sex, or national origin." The courts of appeals have construed the phrase "otherwise to discriminate" to require "a materially adverse change in the terms or conditions of employment." *Weeks v. New York State (Div. of Parole)*, 273 F.3d 76, 85 (2d Cir. 2001); *Jacklyn v. Schering-Plough*, 176 F.3d 921, 928 (6th Cir. 1999); *Duffy v. McPhillips*, 276 F.3d 988, 992 (8th Cir. 2002). See also *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). (adverse employment action must involve "ultimate employment decision"). This Court adopted this concept in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998), when it held that "tangible employment action" is required for vicarious liability.[3]

The retaliation provision of Section 2000e-3 makes it unlawful "[f]or an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." The Court of Appeals for the Second, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have construed this retaliation provision to require the same

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3. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." 524 U.S. at 761.

"adverse employment action" as in a discrimination claim under §2000e-2.[4] This standard was applied by the Seventh Circuit in this case.[5] (App. 14.)

The EEOC has explicitly rejected this construction of the retaliation provisions of 42 U.S.C. §2000e-3(a). The EEOC Compliance Manual, Section 8, "Retaliation," par. 8008 (1998) states as follows:

> Some courts have held that the retaliation provisions apply only to retaliation that takes the form of ultimate employment actions. Others have construed the provisions more broadly, but have required that the action materially affect the terms, conditions, or privileges of employment.
>
> The Commission disagrees with those decisions and concludes that such constructions are unduly

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4. *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000); *Von Gunten v. Maryland*, 243 F.3d 858, 863 n.1 (4th Cir. 2001); *Webb v. Cardiothoracic Surgery Associates*, 139 F.3d 532, 540 (5th Cir. 1998); *Penny v. United Parcel Serv.*, 128 F.3d 408, 417 (6th Cir. 1997). *Jacob-Mua v. Veneman.*, ___ F.3d ___, 2002 WL 904729 (8th Cir. 2002); *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 533 (10th Cir. 1998).

5. "We have already concluded that, under Title VII, Sutherland's conduct during the inspection was not severe enough to constitute actional sexual harassment. Under our case law, it follows that any harassment or humiliation Ms. Hilt-Dyson suffered during the inspection was not severe enough to constitute an adverse employment action." (App. 14.)

> restrictive. The statutory retaliation clauses prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Of course, petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity. More significant retaliatory treatment, however, can be challenged regardless of the level of harm. (footnotes omitted)

The EEOC based its construction of the statute "on statutory language and policy considerations."

> The anti-retaliation provisions are exceptionally broad. They make it unlawful "to discriminate" against an individual because of his or her protected activity. This is in contrast to the general anti-discrimination provisions which make it unlawful to discriminate with respect to an individual's "terms, conditions, or privileges of employment." The retaliation provisions set no qualifiers on the term "to discriminate," and therefore prohibit any discrimination that is reasonably likely to deter protected activity. They do not restrict the actions that can be challenged to those that affect the terms and conditions of employment. Thus, a violation will be found if an employer retaliates against a worker for engaging in protected activity through threats, harassment in or out of the workplace, or any other adverse treatment that is reasonably likely to deter protected activity by that individual or other employees.
>
> This broad view of coverage accords with the primary purpose of the anti-retaliation provisions, which is to "[m]aintain[] unfettered access to statutory remedial mechanisms." Regardless of the degree or quality of

> harm to the particular complainant, retaliation harms the public interest by deterring others from filing a charge. An interpretation of Title VII that permits some forms of retaliation to go unpunished would undermine the effectiveness of the EEO statutes and conflict with the language and purpose of the anti-retaliation provisions.

EEOC Compliance Manual Section 8, "Retaliation," par. 8008 (1998) (footnotes omitted)

The EEOC's construction of the statute was adopted by the Ninth Circuit in *Ray v. Henderson,* 217 F.3d 1234, 1243 (9th Cir. 2000) and appears to be the sounder view:

> The EEOC's standard also makes better policy sense. The "materially adverse" standard may be sensible for discrimination claims, where the main harm is to the individual bringing the complaint. A retaliating employer, however, can effectively silence the complaints of many future employees, each of whom might be the victim of "materially adverse" discrimination. Thus, the harm §2000e-3(a) guards against is not discrimination; it is intimidation. *Cf. Robinson v. Shell Oil Co.* 519 U.S. 337, 346 (1997) (noting that purpose of §2000e-3(a) is to "[m]aintain[] unfettered access to statutory remedial mechanisms"). Our focus, therefore, should be on whether or not the employer's intimidation or deterrence is effective, not whether the single employee before us in a given case is suffering greatly or only slightly. For that reason, it seems to me the more appropriate standard is the one first suggested by Judge Posner in the context of employers who retaliate against employees who exercise their First Amendment rights: whether or not the

> employer's conduct is "[]likely to deter a person of ordinary firmness from that exercise." *Bart v. Telford,* 677 F.2d 622, 625 (7th Cir. 1982). While that test can apply, of course, only to public employers, I would not lightly hold that statutory rights, established by Congress to enforce guarantees of equal freedom in the Fourteenth Amendment, are entitled to lesser protections. If, then, the appropriate question to ask is whether a person of ordinary firmness could resist the employer's effort at deterrence, it seems likely that more than "materially adverse" employment decisions must be given statutory protection. Today's psychologically and sociologically sophisticated employers know many ways to control and shape a workforce beyond the relatively blunt instruments of firing and demotion. See Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production,* 94 Colum. L.Rev. 753, 773-823 (1994); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach,* 101 Colum. L.Rev. 458, 460-61 (2001). To ignore the fact that an employer can manipulate seemingly trivial features of the workplace, such as an employee's sense of teamwork and group approbation, to create highly effective barriers to complaint is to blink at reality.

Bostic v. AT&T of Islands, 166 F.Supp.2d 350, 361-62 (D.Virgin Islands 2001)

The EEOC's construction of 42 U.S.C. §2000e-3(a) is consistent with the standard applied to a First Amendment retaliation claim, i.e., that the retaliatory action "would deter a person of ordinary firmness from continuing to engage in that conduct." *Thaddeus-X v.*

Blatter, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). Moreover, the agency's interpretation of Title VII should be entitled to judicial deference. *EEOC v. Arabian Am. Oil Co.,* 499 U.S. 244, 257 (1991).

The Seventh Circuit acknowledged that "it is indeed a close call as to whether the record would support a determination that Sutherland's actions during the inspection can be characterized as an effort to demean [petitioner] on account of her sex." (App. 11.) The supervisor's decision "to leer at the chest of a female subordinate," id., because she had complained of the supervisor's sexual harassment should be actionable as a retaliatory act under 42 U.S.C. §2000e-3(a).

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

May, 2002

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-1021

JUDITH HILT-DYSON

Plaintiff-Appellant,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
No. 99 CV 6307 —**James F. Holderman** *Judge.*

Argued December 5, 2001—Decided February 27, 2002

Before Coffey, Ripple, and Diane P. Wood,, Circuit Judges.

Ripple, Circuit Judge. Judith Hilt-Dyson, an officer with the Chicago Police Department (''CPD''), filed this action against the City of Chicago (''the City'') alleging that the conduct of her supervisor, Lieutenant William Sutherland, constituted sexual harassment in violation of Title VII. Ms. Hilt-Dyson also alleged that Sutherland retaliated against her for reporting his purported discriminatory conduct to the CPD. The district court entered summary judgment for the City on both claims. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I. BACKGROUND

I.A Facts

In 1998, the CPD stationed Ms. Hilt-Dyson, a female police officer, in its Evidence and Recovered Property Section (''ERPS''). Operating in a caged area with four vaults and several offices, the ERPS functions as a repository for

confiscated property including narcotics and weapons. In February 1998, the CPD appointed Lieutenant William Sutherland as the commanding officer of the ERPS.

On March 24, 1999, Sutherland approached Ms. Hilt-Dyson as she worked on a computer located in the ERPS. He rubbed the middle of her back with his left hand. Sutherland then slid his left hand to Ms. Hilt-Dyson's right shoulder and squeezed it. The contact between Ms. Hilt-Dyson and Sutherland lasted less than a minute. A third officer, Walter Bland, was present during this incident. On the following day, March 25, 1999, while Ms. Hilt-Dyson ate lunch with several of her co-workers in the ERPS' mail room, Sutherland approached her. Once again, Sutherland rubbed the middle of Ms. Hilt-Dyson's back and touched her shoulder.[1] After Sutherland removed his hand from Ms. Hilt-Dyson, she addressed him and stated, "Lieutenant, you like touching me." R.27 at 9. Sutherland denied his subordinate's accusation and contended that he merely was trying to get her attention. When Ms. Hilt-Dyson indicated her disapproval of the contact, Sutherland stated, "I won't touch you anymore." R.27 at 9. After these two incidents, Sutherland never touched Ms. Hilt-Dyson again.

On March 26, 1999, Ms. Hilt-Dyson filed a "To-From Report" with the CPD in which she contended that Sutherland's actions constituted sexual harassment. Pursuant to department regulations, the CPD's Office of Professional Standards ("OPS") began an investigation into the two incidents. The OPS sustained Ms. Hilt-Dyson's complaint with regard to the March 25 contact and recommended a

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1. Sutherland contends that he merely tapped Ms. Hilt-Dyson on her shoulder because he wanted to say goodnight to her before he left.

suspension for Sutherland. Upon reviewing the case, CPD officials disagreed; they concluded that the complaint was not sustained[2] and overruled the determination of the OPS.

In May 1999, two months after the back rubbing incidents, the CPD directed unit commanding officers—including Sutherland—to conduct an inspection of their subordinates' spring dress uniforms. During an inspection, the commander seeks to ensure that his subordinates' uniforms fit properly, comply with CPD standards and are not worn out. Moreover, in the ERPS, the commanding officer attempts to conduct the inspection in such a manner as to enable members of the division to return to work as quickly as possible.

On May 6, 1999, Sutherland complied with the CPD's order and reviewed simultaneously the uniforms of his four subordinates—including Ms. Hilt-Dyson. Because of limited space in the ERPS, Sutherland held the inspection in the hallway adjacent to the division's administrative offices. His four subordinates formed a line in the hallway. Although Ms. Hilt-Dyson occupied the second position in this line, Sutherland reviewed her uniform first.[3] According to Ms. Hilt-Dyson, Sutherland stared at her chest during the inspection. He then informed Ms. Hilt-Dyson that her uniform blazer fit too snugly; he ordered her to raise her arms. After

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2. A finding of "not sustained" means that the CPD concluded that insufficient evidence existed to prove or disprove an allegation.

3. During the inspection, Ms. Hilt-Dyson wore a blazer, sometimes referred to as a "blouse" by the CPD. Underneath the blazer, Ms. Hilt-Dyson wore her uniform shirt as well as a gun belt that held her service revolver as well as other equipment.

the inspection, a male officer described this latter order as demeaning. During previous inspections, however, Sutherland, as well as other commanders, had required male and female officers to lift their arms to determine if their blazers fit properly.[4] Continuing with the inspection, Sutherland asked Ms. Hilt-Dyson to remove her uniform hat; he noted deficiencies in the condition of the hat including scratches on the brim as well as a dull shield. He next ordered Ms. Hilt-Dyson to open her blazer. After inspecting Ms. Hilt-Dyson's service revolver, Sutherland told Ms. Hilt-Dyson to correct the problems with her uniform and then dismissed her from the inspection. Shortly after the inspection, Ms. Hilt-Dyson ordered a new blazer, uniform hat and shield. Sutherland did not touch Ms. Hilt-Dyson in any manner during the inspection.

Ms. Hilt-Dyson promptly requested that the CPD initiate a Complaint Register ("CR") against Sutherland. Specifically, she alleged that the orders directing her to raise her arms and remove her hat during the inspection constituted sexual harassment. The OPS agreed and recommended that the CPD suspend Sutherland for two days. Upon reviewing this determination, CPD officials disagreed with the OPS' findings and concluded that the complaint was not sustained.

Six months after the inspections—January 8, 2000—an incident occurred between Ms. Hilt-Dyson and a fellow officer, Ellen Rake. According to Ms. Hilt-Dyson, Rake

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4. A commander asks an officer to raise his arms to assess the officer's range of motion—particularly, his ability to draw his weapon from underneath the blazer. See R.24 at 10 (Defendant's Statement of Undisputed Material Facts); R.27 at 12 (Plaintiff's Local Rule 56.1(B) Statement).

became involved in a verbal dispute with a CPD property custodian over the possible location of a missing item. Rake called for Ms. Hilt-Dyson and inquired whether anyone had recovered the item during Ms. Hilt-Dyson's shift. After approaching Rake, Ms. Hilt-Dyson contends that she briefly touched Rake's elbow and then immediately apologized for the contact.[5]

Immediately after the incident, Sutherland met with both officers in his office. He inquired whether Rake wished to file an Injury on Duty ("IOD") report and to initiate a CR against Ms. Hilt-Dyson. Rake initially declined this invitation. However, while gathering paper to write a To-From Report on the incident, Rake experienced tenderness in her back. Because she had a preexisting back injury, Rake believed that she needed "to cover" herself and thus requested that an IOD report be completed.[6]

Once Rake requested the IOD report, a CR had to be initiated against Ms. Hilt-Dyson pursuant to CPD regulations. According to Ms. Hilt-Dyson, Rake approached her shortly after requesting the IOD and stated, "He [Sutherland] told

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5. Rake disputes this version of events. According to Rake, Ms. Hilt-Dyson entered the room, spun Rake around and then forcibly pulled Rake several feet. Although a fellow officer corroborates Rake's account, Ms. Hilt-Dyson contends that this officer was not present during the incident.

6. It is unclear to whom precisely Rake made this request. Sutherland states that Rake approached him concerning the IOD Report and he, in turn, relayed the request to Sergeant Victor Mitkal. Rake submits that she approached Mitkal directly. In deposition testimony, Mitkal stated that Sutherland, at the direction of Rake, requested the completion of an IOD Report.

me I have to get a CR number." R.27 at 23. After investigating the complaint, the OPS recommended that the CPD suspend Ms. Hilt-Dyson for seven days. A review panel, however, disagreed; it concluded that it could not sustain the allegation that Ms. Hilt-Dyson had intentionally touched Rake.

I.B District Court Proceedings

-1-

On September 24, 1999, Ms. Hilt-Dyson filed this action against the City in the district court. She alleged that Sutherland had subjected her to sexual harassment in violation of Title VII. In particular, she claimed that the back rubbing incidents as well as the uniform inspection created a hostile work environment in the ERPS. Ms. Hilt-Dyson further submitted that Sutherland retaliated against her because she had reported his alleged discriminatory conduct to the CPD. Specifically, Ms. Hilt-Dyson contended that Sutherland retaliated by the manner in which he con ducted the inspection and by ordering Rake to file a false complaint—the CR—against her.

The City moved for summary judgment on Ms. Hilt-Dyson's hostile work environment and retaliation claims. In particular, the City submitted that Sutherland's alleged discriminatory conduct was not sufficiently severe or pervasive to constitute sexual harassment as that term is employed under Title VII. The City emphasized that Sutherland's alleged harassment involved isolated incidents that were neither egregious nor pervasive. Turning to the claim of retaliation, the City noted that the inspection procedure required that the commanding officer inspect the fit of the officers' blazer and that the procedure employed by Sutherland was the one employed on other occasions. The City further argued that the CPD regulations required the filing of the CR against Ms. Hilt-Dyson after the incident with Rake. Accordingly, the City submitted that the CR could not have been filed to retaliate against Ms. Hilt-Dyson.

In response, Ms. Hilt-Dyson submitted that, when viewing the facts in the light most favorable to her, a reasonable jury could conclude that Sutherland's conduct constituted sexual harassment. In particular, she argued that the back rubbing incidents coupled with the uniform inspection created a hostile work environment. Finally, Ms. Hilt-Dyson argued that she had alleged sufficient facts to indicate that Sutherland had ordered Rake to file a false complaint against her.

-2-

The district court entered summary judgment for the City. It concluded that Ms. Hilt-Dyson could not demonstrate that an objectively reasonable person would have found her working conditions hostile. In particular, the back rubbing incidents and the uniform inspection were isolated occurrences. According to the district court, a reasonable person would not perceive these events to be so abusive or hostile as to amount to sexual harassment.

Similarly, the district court rejected Ms. Hilt-Dyson's claims of retaliation. According to the district court, Ms. Hilt-Dyson failed to establish a prima facie case of retaliation concerning Sutherland's inspection of her uniform. In particular, she could not demonstrate how the inspection amounted to an adverse employment action. As for her other claim of retaliation—the filing of the CR against her—the court concluded that City had a legitimate reason for its actions. CPD regulations required the filing of the CR once Rake filed the IOD report. Therefore, concluded the court, the CR had not been filed to retaliate against Hilt-Dyson for her complaints against Sutherland.

II. DISCUSSION

-A-

We review de novo the district court's grant of summary judgment. *See Thomas v. Pearle Vision, Inc.*, 251 F.3d 1132, 1136 (7th Cir. 2001). Summary judgment is appropriate "if

the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The court's function is not to weigh the evidence but merely to determine if "there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). We must ask whether "there are genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250. In assessing whether a genuine issue of material fact exists, we must construe all facts and draw all reasonable inferences in the light most favorable to the non-moving party. See id. at 255; *Basith v. Cook County*, 241 F.3d 919, 926 (7th Cir. 2001).

-B-

Ms. Hilt-Dyson submits that Sutherland's conduct created a hostile work environment at ERPS and thus constituted sexual harassment in violation of Title VII. To maintain an actionable claim under this theory, an employee must demonstrate that her co-worker or supervisor harassed her because of her sex. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). In addition, this harassment must be "so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). Moreover, a hostile work environment is one that is "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher*, 524 U.S. at 787; *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 807 (7th Cir. 2000). In determining whether contested conduct actually creates an objectively hostile work environment, a number of factors may be

considered including "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Faragher,* 524 U.S. at 787-88; *Hostetler,* 218 F.3d at 806. Moreover, the alleged discriminatory conduct cannot be considered in a vacuum; rather, an em ployee's claim must be evaluated in light of the social context in which events occurred. *See Oncale,* 523 U.S. at 82.

Simply put, Title VII does not prohibit all verbal or physical harassment in the workplace. *See Oncale,* 523 U.S. at 81. Although a bright line does not exist separating innocuous from actionable behavior, this court has noted that isolated and minor incidents of questionable conduct generally will not warrant a conclusion of sexual harassment. *See Koelsch v. Beltone Elecs. Corp.,* 46 F.3d 705, 708 (7th Cir. 1995). "[T]he occasional vulgar banter, tinged with sexual innuendo of coarse or boorish workers" generally does not create a work environment that a reasonable person would find intolerable. *Baskerville v. Culligan Int'l Co.,* 50 F.3d 428, 430 (7th Cir. 1995). A limited number of incidents, however, does not preclude necessarily a trial on a sexual harassment claim. On several occasions, we have reversed the grant of summary judgment for a defendant on a sexual harassment claim despite the fact that the employee alleged relatively few incidents of objectionable conduct. *See, e.g., Hostetler,* 218 F.3d at 809 (fellow employee not only forcibly kissed plaintiff but later cornered plaintiff and attempted to remove her brassiere); *Smith v. Sheahan,* 189 F.3d 529, 532 (7th Cir. 1999) (fellow employee physically assaulted plaintiff and had history of verbally abusing female coworkers). In these cases, however, the objectionable conduct, even though isolated, proved so severe as to create potentially a hostile work environment for the employee.

We must assess whether Ms. Hilt-Dyson has alleged an actionable claim of a hostile work environment due to sexual

harassment. It is clear from the record that Ms. Hilt-Dyson subjectively considered her work environment to be hostile and abusive. In deposition testimony, Ms. Hilt-Dyson stated that she felt violated after Sutherland touched her back on two occasions. She further indicated that she found these back rubbing incidents demeaning and degrading. The City, in fact, concedes that Ms. Hilt-Dyson perceived her work environment as hostile.

Despite Ms. Hilt-Dyson's subjective perceptions concerning ERPS, an objective person would not view her work environment as hostile or abusive. In particular, the back rubbing incidents at issue in this case, although inappropriate behavior in the workplace, do not constitute by themselves actionable harassment under Title VII. Sutherland, her supervisor, rubbed her back on two occasions in March 1999. On each occasion, the back rubbing incident was brief and involved no threats, intimidation or humiliation. Moreover, upon learning that this conduct troubled Ms. Hilt-Dyson, Sutherland told her that he would not touch her again. Indeed, the parties agree that Sutherland never touched nor attempted to touch Ms. Hilt-Dyson after the second back rubbing incident. Given these circumstances, the back rubbing incidents did not constitute actionable sexual harassment under Title VII.

Ms. Hilt-Dyson also submits that the uniform inspection could lead a reasonable juror to conclude that she had been subjected to sexual harassment in violation of Title VII. Ms. Hilt-Dyson contends that, during the inspection, Sutherland stared at her chest and required her to raise her arms. She also contends that he inspected her hat and revolver in an effort to harass and humiliate her.

Ms. Hilt-Dyson subjectively considered the incident severe enough to create a hostile work environment. In arguing that a reasonable juror would reach the same assessment when evaluating the event objectively, she relies on her own

account of the inspection and the statement of another officer that, in his opinion, the lieutenant's order that she raise her hands over her head constituted a "demeaning order." R.27, Ex.4. As noted earlier, we cannot divorce conduct from the context in which it occurred. Sutherland did not order Ms. Hilt-Dyson to lift her arms and to turn over her hat for inspection during a routine workday. To the contrary, the directions were given as part of a uniform inspection—an event that by its nature involves scrutiny of an officer's clothing and equipment in an effort to ensure that the CPD's officers meet uniform requirements and are prepared to fulfill their responsibilities. In this context, inspection of gun belts and uniform caps, as well as increased scrutiny of a subordinate's blazer, may serve a legitimate purpose. Discipline in police departments is quasi-military in nature and sworn officers expect to participate in inspections, drills and other activities that create superior-subordinate encounters not found in civilian occupations. Many of these encounters, especially inspections, are often unpleasant and, in the eyes of the subordinate, demeaning. On the other hand, those in authority in such organizations still have the obligation, within the context of the legitimate demands imposed by their responsibilities, to comply fully with the law protecting the civil rights of their subordinates. The inspection process neither gives a commanding officer license to leer at the chest of a female subordinate nor the authority to single out a female officer for increased scrutiny because of her sex. Mindful of our obligation to assess the record in the light most favorable to Ms. Hilt-Dyson, it is indeed a close call as to whether the record would support a determination that Sutherland's actions during the inspection can be characterized as an effort to demean her on account of her sex. We need not decide the issue definitively, however, because, even if we were to accept Ms. Hilt-Dyson's assessment of the situation, we could not conclude that the incident was so severe or pervasive as to constitute sexual harassment.

Even when considering the uniform inspection in conjunction with the early incidents, Ms. Hilt-Dyson's claim cannot survive summary judgment. The back rubbing incidents were simply insufficient to state a claim for hostile work environment sexual harassment. Coupling these events with the uniform inspection does not create a sufficient inference of a hostile work environment at the ERPS to survive summary judgment. We must therefore conclude that the district court properly entered summary judgment on Ms. Hilt-Dyson's sexual harassment claim.

-C-

Finally, we turn to Ms. Hilt-Dyson's contention that Sutherland retaliated against her for reporting his alleged discriminatory activity to the CPD. Title VII prohibits an employer from retaliating against an employee who has "opposed any practice made an unlawful employment practice by this subchapter or . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing" under the statute. See 42 U.S.C. §2000e-3(a). To demonstrate that an employer has violated this provision of Title VII, an employee may present either direct or indirect evidence of the employer's retaliatory intent. Direct evidence, however, frequently does not exist in these cases. As such, most employees attempt to satisfy their burden through the indirect method of proof.

Under this indirect methodology, an employee must first present evidence sufficient to establish a prima facie case that her employer retaliated against her in violation of Title VII. More precisely, an employee must demonstrate that: (1) she engaged in statutorily protected activity; (2) she performed her job according to her employer's legitimate expectations; (3) despite meeting her employer's legitimate expectations, she suffered a materially adverse employment action; and (4) she was treated less favorably than similarly situated employees who did not engage in statutorily protected activity. *See*

Stone v. City of Indianapolis Pub. Utils. Div., No. 01-3210, 2002 WL 234239, at *1 (7th Cir. Feb. 19, 2002). Absent direct evidence of retaliation, failure to satisfy any element of the prima facie case proves fatal to the employee's retaliation claim. Once the employee succeeds in proving her prima facie case, the employer must offer a legitimate, noninvidious reason for the adverse employment action. *See Stone*, 2002 WL 234239, at *3; *Aviles v. Cornell Forge Co.*, 241 F.3d 589, 592 (7th Cir. 2001). Once the employer has done so, the burden of production shifts back to the plaintiff to demonstrate the pretextual nature of the proffered reason. *See Stone*, 2002 WL 234239, at *3; *Aviles*, 241 F.3d at 592. At this point, if the employee fails to establish pretext, her retaliation claim cannot survive summary judgment.

-1-

Ms. Hilt-Dyson first contends that the manner in which Sutherland inspected her uniform constituted actionable retaliation under Title VII. Because Ms. Hilt-Dyson does not offer any direct evidence of retaliatory intent, she proceeds under the indirect method of proof. As we noted earlier, the inability to prove even a single element of the prima facie case proves fatal to a retaliation claim.

We focus on the third prong of Ms. Hilt-Dyson's prima facie case—whether the uniform inspection constitutes an adverse employment action. As Ms. Hilt-Dyson aptly notes, this court has adopted a broad definition of the phrase "adverse employment action." *See Oest v. Ill. Dep't of Corr.*, 240 F.3d 605, 612 (7th Cir. 2001) (quoting *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996)). An adverse employment action is one that is materially adverse, "meaning more than a mere inconvenience or an alteration of job responsibilities." Id. (quoting *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)). Although creating a precise list of activities that constitute adverse employment actions would be impossible because of

the unique circumstances of individual cases, we have indicated that materially adverse actions may include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Ribando v. United Airlines, Inc.*, 200 F.3d 507, 510 (7th Cir. 1999). We have emphasized that an adverse employment action need not be quantifiable in terms of pay or benefits. *See Smart*, 89 F.3d at 441. At the same time, though, "not everything that makes an employee unhappy is an actionable adverse action." Id.

Upon reviewing the record in this case, we conclude that the uniform inspection did not constitute an adverse employment action. In large measure, Ms. Hilt-Dyson contends that the uniform inspection not only embarrassed her but also amounted to harassment. Conditions of employment designed to harass and humiliate an employee because she is a member of one of Title VII's protected classes may constitute an adverse employment action. *See Stockett v. Muncie Ind. Transit Sys.*, 221 F.3d 997, 1001 (7th Cir. 2000). However, the harassing conduct must be actionable harassment—severe or pervasive—before it will be considered an adverse employment action. *See id.* at 1002 (citing *North v. Madison Area Ass'n for Retarded Citizens-Developmental Ctrs. Corp.*, 844 F.2d 401, 409 (7th Cir. 1988) for the proposition that harassment must be "severe or pervasive" to be actionable under Title VII). In essence, then, this aspect of Ms. Hilt-Dyson's claim of retaliation overlaps with her claim of sex based discrimination. We have already concluded that, under Title VII, Sutherland's conduct during the inspection was not severe enough to constitute actionable sexual harassment. Under our case law, it follows that any harassment or humiliation Ms. Hilt-Dyson suffered during the inspection was not severe enough to constitute an adverse employment action.

Moreover, on numerous occasions, we have stated that negative evaluations, standing alone, do not constitute adverse employment actions. *See Grube v. Lau Indus., Inc.*, 257 F.3d 723, 729 (7th Cir. 2001); *Oest*, 240 F.3d at 613; *Ribando*, 200 F.3d at 511. Sutherland's critique of Ms. Hilt-Dyson's blazer and uniform hat falls within this general rule. Ms. Hilt-Dyson does not contend that this evaluation triggered a reduction in pay or a diminution in job responsibilities. Although Ms. Hilt-Dyson ordered a new blazer and shield after the inspection, she does not submit that these purchases amounted to an adverse employment action. Simply put, this inspection did not constitute an adverse employment action. Thus, the district court properly entered summary judgment on this portion of Ms. Hilt-Dyson's retaliation claim.

-2-

Ms. Hilt-Dyson also contends that the CR filed against her in January 2000 constitutes actionable retaliation. More precisely, Ms. Hilt-Dyson submits that Sutherland ordered Rake to file a false complaint—the CR—against her. We shall assume, without deciding, that Ms. Hilt-Dyson is able to establish a prima facie case of retaliation. *See, e.g., Debs v. Northeastern Ill. Univ.*, 153 F.3d 390, 397 (7th Cir. 1998). The burden shifts to the City to articulate a legitimate, non discriminatory reason for the initiation of the CR against Ms. Hilt-Dyson. If an officer files an IOD report because she has been injured due to the conduct of a fellow officer, CPD regulations require the initiation of a CR against the officer who caused the injury. In this case, the parties agree that once Rake submitted an IOD report, a CR had to be initiated against Ms. Hilt-Dyson. The City, then, has proffered a legitimate, nondiscriminatory reason for the filing of the CR against Ms. Hilt-Dyson.

Because the City has met its burden of production, Ms. Hilt-Dyson may survive summary judgment only if she

demonstrates the pretextual nature of this proffered explanation. She, however, has failed to meet her burden. It is clear the parties dispute the extent of the altercation that occurred between Ms. Hilt-Dyson and Rake. However, this particular factual dispute is neither material to this action nor indicative of pretext. Rake's deposition testimony unequivocally indicates that she filed the IOD "to cover" herself because she had a preexisting back injury. Regardless of whether Ms. Hilt-Dyson tapped Rake's arm or pulled Rake across ERPS, Rake clearly felt the contact warranted the IOD report. Although the record is equivocal about whether Rake asked her sergeant or Sutherland to initiate an IOD report on her behalf, this lack of clarity is also immaterial. In her deposition, Rake indicated that she, of her own volition, requested the IOD report. Whether she approached Sutherland or her sergeant to initiate the process does not change the fact that she alone made the determination to obtain the IOD report. Once she made this request, department regulations required the filing of a CR against Ms. Hilt-Dyson.

Ms. Hilt-Dyson's primary challenge to this evidence is a statement Rake allegedly made on January 8. According to Ms. Hilt-Dyson, Rake stated "He [Sutherland] told me I have to get a CR number." R.27 at 23. The district court refused to consider the statement on the grounds that it was hearsay. We cannot accept Ms. Hilt-Dyson's submission on appeal that the statement is admissible as an excited utterance. More fundamentally, although this statement may indicate displeasure with filing the CR, it has no bearing on whether Rake, of her own volition, initiated the request for

an IOD report. Because Ms. Hilt-Dyson has failed to establish pretext, the district court properly entered summary judgment on this portion of her claim.[7]

III. Conclusion

We conclude that none of Ms. Hilt-Dyson's claims present a genuine issue of triable fact. Accordingly, the judgment of the district court is affirmed.

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7. Ms. Hilt-Dyson also submitted that the filing of the CR constituted actionable sexual harassment. However, as the analysis indicates, the CR was filed for a legitimate, nondiscriminatory reason. As such, the CR, even if considered with the uniform inspection and the back rubbing incidents, would not give rise to a claim for sexual harassment.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-1021

JUDITH HILT-DYSON

Plaintiff-Appellant,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
No. 99 CV 6307 —**James F. Holderman** *Judge.*

[February 27, 2002]

JUDGMENT — ORAL ARGUMENT

Honorable John L. Coffey, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable Diane P. Wood, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 99 CV 6307

JUDITH HILT-DYSON

Plaintiff,

CITY OF CHICAGO,

Defendants.

MEMORANDUM OPINION AND ORDER

HOLDERMAN, District J. Plaintiff Judith Hilt-Dyson, a police officer with the Chicago Police Department (''CPD'') filed a complaint against defendant City of Chicago alleging hostile environment sexual harassment and retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.. Defendant City has filed a motion for summary judgment. Plaintiff responded to the motion and filed a motion to strike portions of the City's statement of facts largely on relevance and materiality grounds. The City responded to plaintiff's motion and filed its own motion to strike. Rather than address the motions to strike independently, this court considered the arguments raised in the motions to strike in ruling on defendant's motion for summary judgment. For the following reasons, defendant's motion for summary judgment is GRANTED. The parties' motions to strike are both DENIED.

I. STATEMENT OF FACTS[1]

The facts, viewed in the light most favorable to the plaintiff, are as follows. Plaintiff is a female officer of defendant City of Chicago Police Department ("CPD"). Plaintiff has been a police officer with the CPD since February 11, 1980. From 1998 until February 10, 2000, plaintiff was detailed to the CPD's Evidence and Recovered Property Section ("ERPS"). The function of ERPS is to intake, process, store, and destroy confiscated weapons, narcotics, and other property. ERPS is a caged area with a counter, mailroom, several vaults, and several offices.

Lieutenant William Sutherland became the Commanding Officer for ERPS in February 1999. Prior to that time, plaintiff and Lt. Sutherland did not know each other. Plaintiff claims that on March 24, 1999, while she was working in a vault computer area at ERPS, Lt. Sutherland placed his left hand in the middle of her back and while rubbing her back, moved his left hand to her right shoulder and squeezed it. Plaintiff does not recall how many seconds this contact with her back and shoulder lasted, but she is sure that it was less than one minute. Plaintiff testified that Lt. Sutherland did not touch her anywhere other than her back and shoulder on March 24, 1999. Plaintiff testified that after the incident, she immediately felt violated. Plaintiff does not recall reporting the March 24 touching to a supervisor on that date. Lt. Sutherland does not remember the alleged incident.

Plaintiff also claims that the following day, March 25, 1999, while she was having lunch in the mailroom with several other officers, Lt. Sutherland entered the mailroom

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1. The following statement of facts comes from the parties' Local Rule 56.1(a) and 56.1(b) statements of material facts and accompanying exhibits.

and greeted her and the other personnel. After resuming eating her lunch and while facing her desk, plaintiff maintains that Lt. Sutherland firmly placed his left hand on the left side of her back and rubbed her back in an up and down, zig-zag motion while moving his left hand toward her right shoulder. Plaintiff claims that after Lt. Sutherland's left hand reached her shoulder, he removed his left handfrom her body. Plaintiff testified that the touching made her feel violated because a supervisor "had no business [to] put his hands on me." Plaintiff does not recall how long Lt. Sutherland's left hand was in contact with her back and shoulder on March 25, 1999. Plaintiff testified that Lt. Sutherland did not touch her anywhere other than her back and shoulder on March 25, 1999. Officer Bland, who witnessed the March 25, 1999 contact, testified that it appeared to him that Lt. Sutherland touched plaintiff only "to get her attention and say goodnight." Plaintiff claims that after Lt. Sutherland made contact with her back and shoulder, she said "Lieutenant, you like touching me." According to plaintiff, Lt. Sutherland responded by saying "I was just trying to get your attention." Plaintiff testified that she responded: "I listen very well." Plaintiff states that after she said that, Lt. Sutherland responded by saying, "I won't touch you anymore." After the March 25, 1999 incident, Lt. Sutherland did not touch plaintiff again.

In a To-From Report dated March 26, 1999, plaintiff notified Abel Presas, the Commander of the General Support Division of the CPD, about the alleged contact between plaintiff and Lt. Sutherland on March 24 and 25, 1999. Plaintiff claims that those contacts constituted sexual harassment. Pursuant to the CPD's sexual harassment policy, on or about March 26, 1999, a Complaint Register ("CR") was initiated against Lt. Sutherland regarding the alleged back and shoulder contact on March 24 and 25, 1999. A CR is an investigation initiated when allegations of violations of CPD rules and regulations are made against a CPD member. The Office of Professional Standards investigated the incident and

determined that the CR should be sustained and that Lt. Sutherland should be suspended for two days. Lt. Sutherland's supervisors rejected this determination and issued a final determination that the allegations in the CR were not sustained, meaning that the CPD concluded that there was insufficient evidence to prove or to disprove the allegations in the CR.

On a regular basis at ERPS, plaintiff wore a utility uniform consisting of a dark blue police shirt, dark pants, name tag, star, black leather belt, and shoes. Sworn CPD officers at ERPS were also required to maintain dress uniform, including a blazer, shirt, hat, and gun belt with gun and accessories. Pursuant to a general order, unit commanding officers were required to conduct an annual inspection of the unit members' spring/fall dress uniform between May 1 and May 10. The purpose of the uniform inspection is to make sure that the uniforms fit, that they comply with CPD standards, that they are serviceable, and that they are not worn out. Uniform inspections at ERPS are less formal than uniform inspections in police districts. Because space is limited at ERPS, uniform inspections are conducted in the hallway. The goal of the uniform inspections at ERPS is to return the members to their work stations as soon as possible after the inspection.

On May 6, 1999, Lt. Sutherland conducted a spring/fall dress uniform inspection at ERPS. Plaintiff and two other officers, Doyle and Burton, both male, were inspected at the same time. Though plaintiff was not the first in line, Lt. Sutherland inspected plaintiff first. Plaintiff testified that Lt. Sutherland skipped over the first officer in line, stood directly in front of her, and "did clearly focus his gaze upon my chest area in such a way as to give the very clear impression that his focus was not consistent with what could reasonably be considered professional." At the May 6, 1999 inspection, plaintiff wore her dress uniform, which included a sport coat or blazer that is referred to by the CPD as a "blouse."

Underneath her blouse, plaintiff wore a shirt and a fully-equipped gunbelt. During the inspection, Lt. Sutherland told plaintiff that her uniform blazer was snug. Lt. Sutherland then directed plaintiff to raise her arms. Lt. Sutherland testified that he asked plaintiff to raise her arms to determine her range of motion to withdraw her weapon because her blouse appeared too tight to him. One of the male officers involved in the inspection testified that plaintiff stated: "Lieutenant, let me get this right. Are you telling me to raise my arms?," and Lt. Sutherland answered "yes." The officer testified that Lt. Sutherland was "standing right up on her when she did this," that tears were forming in plaintiff's eyes, and that Lt. Sutherland was almost eye level with plaintiff's chest Another male co-worker testified that the incident was "demeaning" and "in direct disregard of the concepts and guidelines of sexual equality set forth by this department."

Prior to May 6, 1999, Lt. Sutherland had instructed male officers and other female officers to raise their arms during uniform inspections. Other supervisory personnel besides Lt. Sutherland have also asked CPD members to raise their arms during uniform inspection to see if their blazers fit. During the May 6 inspection, Lt. Sutherland also asked plaintiff to remove her hat. Plaintiff handed her uniform hat to Lt. Sutherland. Lt. Sutherland told plaintiff that her hat brim had scratches and that the hat's metal shield was dull. Lt. Sutherland then instructed plaintiff to unbutton and open her uniform blazer. Lt. Sutherland contends that he asked plaintiff to open her blazer to inspect the items in plaintiff's gun belt. Plaintiff believes that he made the requests of plaintiff to embarrass and humiliate her because she had complained of his sexual harassment.

Lt. Sutherland contends that he gave the same instructions to the other two officers. Plaintiff contends that Lt. Sutherland did not subject the other two officers to "the same type" of inspection, and that they were not asked to

raise their arms. Lt. Sutherland ordered plaintiff to hand him her service revolver. Lt. Sutherland then inspected plaintiff's service revolver. Lt. Sutherland did not touch plaintiff at any time during the May 6, 1999 uniform inspection. During the inspection, Lt. Sutherland directed plaintiff to correct her uniform deficiencies. After plaintiff was inspected, she was dismissed. Plaintiff then left the inspection area and went to her ERPS locker to change from her dress uniform and into her utility uniform so that she could return to work. On or about May 11, 1999, plaintiff ordered a new dress uniform blouse and shied and had her hat replaced. Every year, each police officer receives an allowance to buy, replace, and maintain her uniform. In 1999, plaintiff received an allowance of $1,100, which covered the costs of replacing the items that Lt. Sutherland found deficient during the May 6, 1999 uniform inspection.

On or about May 6, 1999, plaintiff requested that a CR be initiated against Lt. Sutherland because she felt that his order directing her to raise her arms and remove her hat during the dress uniform inspection was discriminatory. On July 16, 1999, the Office of Professional Standards sustained plaintiff's complaint and recommended that Lt. Sutherland be suspended for two days. That recommendation was rejected by Lt. Sutherland's supervisors, who concluded that the evidence was insufficient to warrant any discipline and issued a finding exonerating Lt. Sutherland.

On the morning of January 8, 2000, approximately seven months after the May 6, 1999 inspection, plaintiff was working overtime at ERPS. Officer Ellen Rake was also working at ERPS that morning. Officer Rake had been assigned to ERPS since June 1999 in a light-duty capacity because she has a metal plate in her back and an injured knee. At approximately 8:25 a.m. on January 8, 2000, Officer Rake was in the mailroom talking to another employee about a piece of missing property. Plaintiff was also in the mailroom at the time and described the

conversation between Rake and the other employee as Rake speaking in a loud, profane voice and swearing while the other employee responded without using profanity. Then, according to plaintiff, Rake called plaintiff's name and said "Judy [plaintiff] didn't they find the god damn property on your watch last night." Plaintiff maintains that she then turned from her desk, walked to Rake, and jokingly said "girl stop cursing and go back to the A vault." Plaintiff maintains that, during the incident, she slightly and momentarily touched Rake's arm and immediately apologized. Rake has a different recollection of the incident, stating that plaintiff approached her from behind, pulled her shoulder, flung her around, and grabbed at least one of her arms at the forearm and tugged her out of the mailroom, a distance of about 10 feet. Plaintiff admits that she knew Officer Rake had a back injury and was on light duty at the time of the incident.

Lt. Sutherland then entered the mailroom and brought plaintiff and Officer Rake into the supervisor's office. Sergent Victor Mitkal was also present during the mailroom incident and during the meeting in the supervisor's office. According to Lt. Sutherland, Rake told him that plaintiff had grabbed her and pulled her out of the mailroom and plaintiff explained that the touch had been unintentional. Plaintiff claims that Lt. Sutherland twice asked Officer Rake in a loud voice if she was injured and Rake twice responded: "No, I'm not injured." Plaintiff claims that Lt. Sutherland then asked Rake if she wanted a CR number on plaintiff, and Rake responded that she did not. Lt. Sutherland then asked every one to disperse and write a "To-From" report regarding the contact.

Officer Rake testified that following the meeting, her back was feeling tender, so she decided that she did want an Injury on Duty ("IOD") report to "cover herself." Rake testified in her deposition that she told plaintiff that it was not personal, but in order to get an IOD report, she had to

initiate a CR, and then told Sgt. Mitkal that she wanted an IOD report made. Plaintiff testified that Rake spoke to Lt. Sutherland alone and then told plaintiff: "Judy this is bull shit. He told me I have to get a CR# ." According to Sgt. Mitkal, Lt. Sutherland then instructed him to complete and IOD report for Rake. It was the responsibility of Sgt. Mitkal, as Rake's immediate supervisor, to prepare the IOD report when Rake requested it. Under the CPD rules, the filing of an IOD report requires that a CR be initiated when the injury was caused by a CPD member.

In her To-From report concerning the incident with plaintiff, Officer Rake stated that plaintiff had grabbed her arms and began tugging, and that she told plaintiff not to pull on her because she had a metal plate in her back. Lt. Sutherland also submitted a To-From report and provided a formal statement which cooborated Rake's account, stating that he was approximately 20 feet away from the incident in the vault when he heard shouting and tussling coming from the mailroom. He stated that he looked up and saw plaintiff grab Rake by both her arms and pull her out of the cage. Lt. Sutherland explained the meeting, that Rake initially stated that she did not want to initiate a CR investigation, and that minutes after the meeting Rake approached him, informed him that she was experiencing back pain, and requested that a IOD report be prepared and a CR be initiated. Lt. Sutherland further wrote that he instructed Sgt. Mitkal to do the paperwork. Another employee also cooborated Rake's version of the incident, stating that she had seen plaintiff pull Rake by the arm. Based upon the reports and statements, the Office of Professional Standards ("OPS") recommended that plaintiff be suspended for seven days. Plaintiff appealed that decision to a Complaint Review Panel, arguing that she did not have malicious intent, evidenced by the fact that Rake did not want to initiate a CR report. After reviewing the reports and hearing from plaintiff, the Panel rejected the OPS's findings regarding the incident on May 27, 2000, finding that the evidence did not establish intentional

physical contact.

Plaintiff submitted to a formal interrogation on the Rake charge by OPS on February 10, 2000. Plaintiff submitted evidence showing that on February 11, 2000, her personal physician observed that she was extremely distressed and felt that she was unable to return to work under the present circumstances. Plaintiff's physician prescribed antidepressant and anti-anxiety medication and referred her to a psychiatrist. The CPD ordered plaintiff to be examined by its psychologist after plaintiff reported her condition. The tests administered by the City's psychologist indicated emotional distress, including headache, nervousness, crying, and sleep problems. The psychologist concluded that plaintiff was suffering from symptoms of adjustment disorder and emotional distress.

II. STANDARD OF REVIEW

Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In ruling on a motion for summary judgment, the evidence of the nonmovant must be believed and all justifiable inferences must be drawn in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1996). This court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.

A party who bears the burden of proof on a particular issue, however, may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). There is no issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson, 477 U.S. at 249. Only admissible evidence can be considered in ruling on a motion for summary

judgment. *Russell v. Acme- Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995) (Hearsay evidence "could not be considered in the summary judgment proceeding.).

III. ANALYSIS

Plaintiff maintains that the March 24 and 25, 1999 touching encounters with Lt. Sutherland and the May 6, 1999 uniform inspection constitute sexual harassment. Plaintiff also complains that she was retaliated against for complaining about sexual harassment when the CR was initiated against plaintiff in January 2000 for the physical contact she had with Rake on January 8, 2000.

I. Sexual Harassment Claim

Title VII prohibits an employer from "discriminating] against any individual with respect to [ ] compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C. §2000e- 2(a)(1) (1994). Sexual harassment is actionable under Title VII only if it is "so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment." *Clark County School Dist. v. Breeden*, ___ S.Ct. ____, 2001 WL 402573, at *1 (U.S. Apr. 23, 2001) (internal quotations omitted); *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 806 (7th Cir. 2000). Whether the harassment rises to this level turns on a constellation of factors that include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Hostetler*, 218 F.3d at 806-07 (internal quotations omitted). Under the law of the Seventh Circuit, the impact of the harassment upon the plaintiff's work environment is measured both objectively and subjectively. The work environment cannot be described as "hostile" for purposes of Title VII unless a reasonable person would find it offensive and the plaintiff actually perceived it as such. Id. (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998)). The harassment

must be sufficiently severe that a rational trier of fact could find that it had actually changed the conditions of the plaintiff's workplace. *Silk v. City of Chicago,* 194 F.3d 788, 804 (7th Cir. 1999).

The City has not challenged, and this court accepts for purposes of this motion, that plaintiff subjectively perceived her working environment to be hostile. Nonetheless, plaintiff cannot survive summary judgment unless she can show that a reasonable person would have found the work environment to be sufficiently hostile. This court finds that plaintiff cannot meet that burden under the law of the Seventh Circuit.

The Seventh Circuit has observed that drawing the line between unpleasant work behavior and actionable objectively hostile work environment is not always easy. other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.'' *Baskerville v. Culligan Int'l Co.,* 50 F.3d 428, 430-31 (7th Cir. 1995).

Here, the two back-rubbing and shoulder-squeezing incidents of which plaintiff complains can undoubtedly be viewed as nonconsensual physical conduct. Unwelcome touching of an intimate nature falls on the actionable side of the line dividing abusive conduct from behavior which is merely vulgar or mildly offensive. *Hostetler,* 218 F.3d at 807. However, this court doubts that a reasonable trier of fact could determine that the Lt. Sutherland's alleged rubbing of plaintiff's back approaches the conduct found actionable in Hostetler, which involved a coworker inserting his tongue into the plaintiff's mouth without invitation and nearly removing her brassiere. However, even if the back rubs were unquestionably actionable behavior, they still cannot form the basis of a sexual harassment claim unless the finder of fact

could label the work environment as hostile "notwithstanding the limited number of the acts involved." Id. at 808. There is no "magic number" of incidents required to establish a hostile environment. Id. Even one act of harassment will suffice if it is egregious. Id.

Here, plaintiff alleges two acts of unwanted back-rubbing, each lasting for no more than one minute, on two consecutive days. The conduct ended when, during the second touching, plaintiff made her displeasure known, Lt. Sutherland stated that he would stop, and kept that promise. The Seventh Circuit has recognized that there are some forms of physical contact which, "although unwelcome and uncomfortable for the person touched, are relatively minor." *Hostetler,* 218 F.3d at 808. As the Seventh Circuit reasoned in Hostetler:

> Cumulatively or in conjunction with other harassment, such acts might become sufficiently pervasive to support a hostile environment claim, but if few and far between they typically will not be severe enough to be actionable in and of themselves. A hand on the shoulder, a brief hug, or a peck on the cheek lie at this end of the spectrum. Even more intimate or more crude physical acts--a hand on the thigh, a kiss on the lips, a pinch of the buttocks--may be considered insufficiently abusive to be described as "severe" when they occur in isolation. When the harassment moves beyond the sort of casual contact which (if it were consensual) might be expected between friendly co-workers, and manifests in more intimate, intrusive forms of contact, it becomes increasingly difficult to write the conduct off as a pedestrian annoyance. Id. (internal citations omitted).

In *Hostetler,* the Seventh Circuit reasoned that the proposition that no reasonable person could think two acts were severe enough to alter the plaintiff's work environment, without the added weight of repetition over time or

cumulation with other acts of harassment, became dubious when the conduct at issue involves unwelcome contact with the intimate parts of one's body. Id. at 808-09. Here, plaintiff alleges that both instances of unwanted touching occurred somewhere between her mid-back and her shoulder, not in any intimate parts of her body. Plaintiff herself submits that the touching was the type of contact which would be appropriate for a "close friend, but was out of place for a supervisor." (Pl. Resp. at n. 1.) Plaintiff has thus admitted that the two touches where the sort of contact that (if consensual) would be expected between friendly co-workers and thus falling on the side of a "pedestrian annoyance." See id. at 808. This case thus involves the sort of "hand on the shoulder" which, although uncomfortable for plaintiff, was objectively relatively minor.

Plaintiff argues that, seen in conjunction with the uniform inspection incident, in which Lt. Sutherland "singled plaintiff out for an embarrassing and humiliating display," Lt. Sutherland's actions crossed the line to actionable harassment. Plaintiff argues that the conduct was "repetat[ive]" and "far more than a few isolated instances of non-severe conduct." Unfortunately, the facts, as admitted by plaintiff and viewed in the light most favorable to her, do not support plaintiff's arguments. Plaintiff admits that there were only two back-touching incidents, which ended as soon as plaintiff made her displeasure known, in addition to the uniform inspection. Plaintiff's characterization of the uniform inspection incident is insufficient to save plaintiff's sexual harassment claim. Even accepting that Lt. Sutherland did not ask the male officers to raise their arms or remove their hats, one improper incident of leering or picking plaintiff out for close scrutiny is not actionable conduct, even when viewed in conjunction with the touching incidents more than one month prior. Plaintiff does not dispute that Lt. Sutherland and other supervisory officers had instructed both male and female officers to raise their arms during uniform inspections in the

past. While a close inspection of one's clothes, including the chest area, might be objectionable in some jobs, the same cannot be said of a police organization with firm uniform rules and mandatory uniform inspections. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (assessment of the objective severity of the harassment must be made with "an appropriate sensitivity to social context").

Plaintiff relies almost entirely upon *Smith v. Sheahan*, 189 F.3d 529 (7th Cir. 1999), for the proposition that Lt. Sutherland's two alleged back-rubbing incidents alone are sufficiently severe to form the basis of a sexual harassment claim. In that case, the Seventh Circuit held that a single assault was enough to warrant a trial on a hostile work environment claim. However, the assault involved in *Smith* damaged the plaintiff's wrist to the point that surgery was required. The court there reasoned: "Although less severe acts of harassment must be frequent or part of a pervasive pattern of objectionable behavior in order to rise to an actionable level, 'extremely serious' acts of harassment do not." Id. at 534 (citing *Faragher*, 118 S.Ct. at 2283). This case is far more in line with the numerous cases in which the Seventh Circuit has found isolated and innocuous incidents not sufficient to form the basis of a sexual harassment claim, and plaintiff's attempts to distinguish those cases is to no avail. *See e.g. Koelsch v. Beltone Electronics Corp.*, 46 F.3d 705, 706-07 (7th Cir. 1995) (one instance of defendant removing shoe and rubbing plaintiff's thigh with foot, one instance of grabbing plaintiff's buttocks, asking for dates and telling off-color jokes not sufficient to survive summary judgment on hostile work environment claim); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993) (two incidents of misconduct by supervisor, one involving a knee rub and fumbled kiss and the other involving an attempted grab, insufficient to find liability on sexual harassment claim).

In the end, plaintiff's argument that the alleged incidents of sexual harassment were severe seems to rest entirely on the fact that she subjectively viewed the incidents as such. However, this court must judge the severity of the incidents under an objective standard following the law of the Seventh Circuit, which makes clear that the conduct at issue, including its brevity and its lack of repetition, is not the type which a reasonable person would find sufficiently severe to form the basis of a sexual harassment claim. The undisputed facts demonstrate that the conduct to which plaintiff was subjected was not the type that a rational trier of fact could find had actually changed the conditions of plaintiff's workplace, and therefore cannot survive summary judgment. *See Silk v. City of Chicago,* 194 F.3d 788, 804 (7th Cir. 1999).

II. Retaliation Claim

Plaintiff claims that Lt. Sutherland retaliated against her for complaining of his alleged sexual harassment in touching plaintiff's back by performing the uniform inspection and for complaining of the uniform inspection and filing a charge with the EEOC by initiating the CR investigation against plaintiff for the incident with Officer Rake. Section 704 of Title VII makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. §2000e-3(a). Lacking any direct evidence of retaliatory intent, plaintiff seeks to fit her claim within the *McDonnell Douglas* framework. A prima facie case of retaliation under Title VII requires the plaintiff to present sufficient evidence that: (1) she engaged in statutorily protected activity, (2) she suffered an adverse employment action, and (3) there is a causal link between the protected expression and the adverse action. *Russell v. Board of Trustees of the University of Illinois at Chicago,* 2001 WL

225051, at *6 (7th Cir. Mar. 8, 2001). In order to demonstrate the "causal link," the plaintiff must demonstrate that the employer would not have taken the adverse action "but for" the protected expression. *See Johnson v. University of Wisconsin-Eau Claire,* 70 F.3d 469, 479 (7th Cir. 1995). If the plaintiff gets this far, the defendant must then come forward with a legitimate business reason for taking the employment action; if it does so, the plaintiff may survive summary judgment only by presenting sufficient evidence that the defendant's justification is pretextual. *See Russell,* 2001 WL 2250501 at *6.

As noted, an employee proceeding under the *McDonnell Douglas* burden-shifting method must show that she suffered a "materially adverse employment action." The Seventh Circuit has defined the phrase broadly, including readily quantifiable losses such as loss or reduction of pay or monetary benefits, in addition to many other forms of adversity. *See Smart v. Ball State University,* 89 F.3d 437, 441 (7th Cir. 1996) (citing examples). However, minor or trivial actions that make an employee unhappy are not sufficient to qualify as materially adverse employment actions under the law. See id. Here, it is unclear whether plaintiff is claiming that the May 1999 uniform inspection performed by Lt. Sutherland was retaliation for her complaints against him. To the extent she makes such a claim, plaintiff's claims cannot survive summary judgment because the uniform inspection was not a materially adverse employment action. It is undisputed that uniform inspections are a regular part of life in the CPD, and that plaintiff, like all other officers, has a uniform allowance to cover expenditures for uniform expenses. Plaintiff does not dispute that her uniform was not in compliance with CPD rules, including a snug "blouse" (blazer), scratched hat brim, and dull metal shield. Plaintiff also does not argue that she was financially burdened by replacing those items. Accordingly, the uniform inspection was, at most and as admitted by plaintiff, a materially adverse employment action in itself.

This court will assume for purposes of this motion that the initiation of the CR investigation against plaintiff was a materially adverse employment action, though it is doubtful that the investigation alone, unaccompanied by any tangible job consequences, would be considered an adverse employment action under the law of the Seventh Circuit. *See Sweeney v. West,* 149 F.3d 550, 556 (7th Cir. 1998). Plaintiff's retaliation claim fails because she cannot show that the initiation of the CR investigation was a pretext for retaliation. Plaintiff does not dispute that Rake requested an IOD report on her own free will. Plaintiff also does not dispute that once an officer requests an IOD report for an injury caused by a CPD member, the supervisor must initiate a CR investigation under the CPD rules. Accordingly, even if this court were to accept plaintiff's hearsay evidence that Rake told her "he's making me fill out a CR," that inadmissable evidence would still not be sufficient to save plaintiff's claim that Lt. Sutherland forced Rake to initiate the CR investigation because it is undisputed that under CPD rules, once Rake requested an IOD report, a CR investigation had to be initiated. Again, plaintiff does not dispute that Rake made the decision to fill out an IOD report on her own free will. For the same reason, it is irrelevant that plaintiff successfully challenged her suspension on the basis that the touching was unintentional; unintentional or not, when one officer requests an IOD report and the cause of the injury was another officer, CPD rules require the initiation of a CR investigation. Accordingly, defendant has presented a legitimate, non-discriminatory reason for its decision and plaintiff has not presented any admissible or inadmissable evidence that the stated reason is "a lie, specifically a phony reason for some action." *Russell v. Acme-Evans Co.,* 51 F.3d 64, 68 (7th Cir. 1995); *see also Jordan v. Summers,* 205 F.3d 337, 343 (7th Cir. 2000) (to show pretext, plaintiff must present evidence that each of the proffered reasons is either a lie or completely lacking a factual basis). Accordingly, plaintiff's retaliation claim must fail.

IV. CONCLUSION

For the reasons stated, defendant's motion for summary judgment is GRANTED. This case is DISMISSED in its entirety. All pending motions are moot.